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**IN THE
COURT OF APPEALS OF INDIANA**

GARY K. FIELDS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 03A04-0510-CR-612
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0502-FB-230

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Gary K. Fields appeals his conviction of two counts of pointing a firearm¹ as Class D felonies, one count of unlawful possession of a handgun by a serious violent felon² as a Class B felony, and his adjudication as an habitual offender.³ Fields presents the following issues on appeal that we consolidate and restate as:

- I. Whether the trial court's final jury instructions regarding unlawful possession of a handgun by a serious violent felon as a Class B felony constituted fundamental error.
- II. Whether there was sufficient evidence to convict Fields of unlawful possession of a handgun by a serious violent felon as a Class B felony.
- III. Whether Fields's convictions for pointing a firearm and unlawful possession of a firearm by a serious violent felon constituted double jeopardy under Article I, Section 14 of the Indiana Constitution.
- IV. Whether Fields's sentence was inappropriate under the new sentencing guidelines and under Appellate Rule 7(B).

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PRCEDURAL HISTORY

On February 9, 2005, after failing to locate his brother, the Defendant, Fields went to his former stepdaughter's, Medora Ferrees's, house. Upon Fields arrival, he gave a gun box to Medora's husband, Stephen, and asked him if he could lock it up in his gun safe for the night, to which Stephen agreed. Medora, Stephen, and Fields stayed up talking that evening. During their conversation, Fields revealed to Medora and Stephen some of his prior criminal activities, leaving them uneasy with Field's presence.

¹ See IC 35-47-4-3

² See IC 35-47-4-5

³ See IC 35-50-2-8 (h)

The next morning, before Stephen left for work, he left Fields's gun and cleaning supplies on top of the kitchen cabinet, just as Fields requested. When Medora woke she fixed breakfast for Fields, her son, and herself. Medora also called a family friend, Glenn Moon and asked him to come over because she was scared of Fields at the time. Fields was cleaning his gun on the kitchen table when Moon arrived. Moon and Fields discussed the gun and its cleaning and Fields told Moon that he needed a place to try out the gun.

Later that day, Medora's sister, Shirley, and her infant daughter, stopped by while Fields was still cleaning his gun. Fields, Medora, and Shirley sat around discussing old times, most notably, Medora's stepmother, Donna Stephenson. Fields told both Medora and Shirley that he wanted to steal things from Donna Stephenson. Fields eventually left with Shirley and her daughter to see if he could locate his brother. While inside Shirley's van, Fields pulled out his gun and starting talking about where one should hide in their vehicle during a shoot out. Fields then had Shirley drive to a remote location where he test-fired his weapon at a road sign. Shirley became scared and decided to return to her house to be near her fiancé, Steven Rains.

Upon their arrival, Steven was asleep, so Shirley and Fields sat around talking. Fields began waving his gun around making threats about robbing and killing Donna Stephenson. Moon showed up later with Fields's belongings and told him that Medora did not want him to come back to her house. Thereafter, Shirley awoke Steven and told him that Fields was there with a loaded weapon. Steven told Fields to unload his gun, which Fields did, but once Steven left the room he reloaded the gun and pointed it at

Shirley while she was holding her infant daughter. Shirley became very nervous and told Steven to take Fields away to again look for his brother.

After another unsuccessful attempt to locate Field's brother, Field's went back to the Ferree home. Field's continued to discuss robbing and killing Donna Stephenson. Field's asked Medora to come into the bathroom to look at his disguises he planned on wearing to commit the robbery. While in the bathroom, Fields pointed his gun at Medora, which scared her and her son who was also present. Medora called her mother, Sandra Crippen, who then spoke to Fields and asked him to leave. After Fields left, the police were called. Fields was later apprehended with his gun nearby.

The State charged Fields with two counts of a Class D felony pointing a firearm, one count of a Class B felony attempted robbery, one count of a Class B felony unlawful possession of a firearm by a serious violent felon ("UPF/SVF"), and one count as an habitual offender. The State also filed its Notice of Aggravating Factors alleging Fields needed correctional or rehabilitative treatment that can best be provided by commitment to a penal facility and that Fields committed an offense within the presence of a person less than eighteen years old who was not the victim of the crime. After a trifurcated trial, the jury returned two guilty verdicts for pointing a firearm, a guilty verdict for UPF/SVF, and, a verdict determining Fields to be an habitual offender. On October 5, 2005, Fields was sentenced to 3 years each for the class D felonies, 18 years for the class B felony, and 25 years for the habitual offender conviction with all sentences to run consecutively for a total of 49 years. Fields now appeals.

DISCUSSION AND DECISION

I. Fundamental Error

Fields contends that the trial court's instructions pertaining to the charge of UPF/SVF constituted fundamental error. Pursuant to IC 35-47-4-5(c), "a serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious felon, a Class B felony." The statute defines "serious violent felon," in pertinent part, as a person who has been convicted of committing a serious violent felony in Indiana or any other jurisdiction in which the elements of a serious violent felony. IC 35-47-4-5(a). As used in the statute, a "serious violent felony" includes the crime of armed robbery. IC 35-47-4-5(b)(12). Thus, to convict Fields of UPF/SVF, the State had to prove that Fields had been convicted of robbery and, thereafter, knowingly or intentionally possessed a firearm. *See* IC 35-47-4-5.

Fields contends the trial court committed fundamental error⁴ in instructing the jury that "a conviction under the laws of Arizona for Armed Robbery . . ." *Appellant's App.* at 213. Specifically, Fields asserts that this instruction effectively removed from the jury the duty of determining, under both the law and the facts, whether Fields's 1987 Arizona conviction was "substantially similar" to the Indiana "robbery" statute.

Fundamental error exists when there is a blatant violation of basic principles such that it deprives defendant his fundamental right of due process. *Davis v. State*, 835

⁴ Fields concedes that his trial counsel did not object to the tendered instructions nor submitted any proposed instructions, and thus he accepts that he must establish fundamental error for this court to provide relief. *See Davis v. State*, 835 N.E.2d 1102, 1107 n. 1 (Ind. Ct. App. 2005) (citing *Williamson v. State*, 771 N.E.2d 70, 72 (Ind. 2002) ("A defendant who fails to object to the court's final instructions and fails to tender a set of instructions at trial waives a claim of error on appeal.")).

N.E.2d 1102, 1107 (Ind. Ct. App. 2005) (citing *Williamson v. State*, 771 N.E.2d 70, 72 (Ind. 2002)). In determining whether fundamental error occurred in the giving of instructions we consider all the relevant information provided to the jury. *Id.* There is no due process violation where all such information, considered as a whole, does not mislead the jury as to a correct understanding of the law. *Id.*

The “[p]urpose of a jury instruction is to inform a jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” *Wilson v. State*, 842 N.E.2d 443, 445 (Ind. Ct. App. 2006). As a general rule, instructing the jury lies within the discretion of the trial court. *Id.* The trial court may only be reversed for an abuse of that discretion. *Id.*

There are two instructions which Fields claims were error. First, Final Instruction No. 3 of the second part of the trifurcated trial states that to convict Fields of UPF/SVF the jury must find beyond a reasonable doubt that “the defendant 1. knowingly or intentionally 2. possessed a firearm 3. after having been convicted of a serious violent felony, i.e. Robbery.” *Appellant’s App.* at 212. Second, Final Instruction No. 4 read, “A conviction under the laws of Arizona for Armed Robbery as a Class 2 dangerous felony qualifies as a “serious violent felony” under the laws of the State of Indiana.” *Appellant’s App.* at 213.

We find no indication that these instructions were an abuse of the trial court’s discretion or that the jury was misled denying Fields due process. The judge was given all the relevant statutes in Indiana and Arizona -- IC 35-47-4-5, Arizona Statutes 13-1901, . . . 13-1902, . . . 13-1904, and . . . 13-701” to compare whether the statutes are

substantially similar and “to enable [the jury] to comprehend the case clearly and arrive at a just, fair, and correct verdict.” *Id.* at 166; *Wilson*, 842 N.E.2d at 445. After reviewing those statutes the trial court instructed accordingly. The instructions did not constitute fundamental error.

II. Sufficiency of the Evidence

Fields claims that there was insufficient evidence to convict him of UPF/SVF. Specifically, he argues that the State never presented any evidence of the elements of armed robbery in Arizona or robbery in Indiana. Instead, “[t]he prosecutor showed only that the defendant was previously convicted in Arizona of armed robbery.” *Appellant’s Br.* at 26 (citing *Tr.* at 555-56). Fields argues that without the State having to present evidence that his Arizona conviction is “substantially similar” to Indiana’s robbery statute, there is insufficient evidence to support his conviction.

When reviewing whether there is sufficient evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Williams v. State*, 834 N.E.2d 225, 228 (Ind. Ct. App. 2005). “We must consider only the probative evidence and reasonable inferences supporting the verdict.” *Id.* “We must affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.” *Id.*

Here, Fields concedes that the jury had probative evidence that he had previously been convicted of armed robbery in Arizona and that he had possession of a firearm in Indiana on the date charged. These facts together as applied to the instruction from the

trial court that the Arizona conviction “qualifies as ‘serious violent felony’ under the law of the State of Indiana” was sufficient to support his conviction.

III. Double Jeopardy

Fields argues that the two counts of pointing a firearm and the one count for UPF/SVF violated Indiana’s prohibition against double jeopardy. Specifically, he contends that the evidence that he pointed a firearm was used to convict him for both counts of pointing a firearm and UPF/SVF.

Article I, Section 14 of the Indiana Constitution states that “[n]o person shall be put in jeopardy twice for the same offense.” Double jeopardy analysis requires dual inquiries of the “statutory element test” and the “actual evidence test.” *Davis v. State*, 770 N.E.2d 319, 323 (Ind. 2002). Fields does not claim that these convictions violated the statutory elements test. The actual evidence test prohibits multiple convictions if there is a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish one or more of the essential elements of a second challenged offense. *Alexander v. State*, 768 N.E.2d 971, 974 (Ind. Ct. App. 2002), *aff’d on reh’g*, 772 N.E.2d 476, 478 (Ind. Ct. App. 2002), *trans. denied*. “In analyzing a double jeopardy claim under the actual evidence test, we must look to the actual evidence presented to the trier of fact, not proof of the elements themselves.” *Alexander*, 772 N.E.2d at 478. “If the evidentiary facts establishing one offense establish only one or several, but not all, of the essential elements of the second offense, there is no double jeopardy violation.” *Oldham v. State*,

779 N.E.2d 1162, 1178 (Ind. Ct. App. 2002) (citing *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002)).

The evidence presented at trial demonstrated that Fields pointed a gun at both Shirley and Medora. It was from this evidence that, in the first part of the trifurcated trial, the jury found Fields guilty of two counts of pointing a firearm. Fields claims this evidence was used in the second part of the trifurcated trial to establish that his pointing of the firearm reasonable inferred that he possessed the same.

Fields's argument fails because his pointing the gun was not the only evidence that he possessed the gun. Since the record was replete with evidence establishing that Fields possessed the gun on the date charged, independent of any pointing, we find there was no double jeopardy violation.

IV. Sentence

Fields claims that his sentence is inappropriate. Specifically, he first contends that the trial court improperly used aggravators under the new sentencing guidelines, and second that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Because we exercise our right under Indiana Appellant Rule 7(B) and reduce Fields's sentences to the advisory, we need not address whether the trial court accurately applied the new sentencing guidelines.

The Indiana Constitution vests the Supreme Court with the power in criminal matter appeals to “review and revise the sentence imposed.” *Neale v. State*, 826 N.E.2d 635, 636 (Ind. 2005) (citing Ind. Const. Art. VII § 4). This authority has been codified in App. Rule 7 (B) stating that, “[t]he Court may revise a sentence authorized by statute if,

after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.'" *Neale*, 826 N.E.2d at 636 (citing App. R. 7(B)). It is only upon a finding of these two conditions that we maintain the right to undertake a sentencing revision. *Id.*

Here, the nature of the crimes are not the most heinous. None was a crime of violence or involved egregious circumstances. The character of the offender is also not the worst. His criminal history contains only one crime of violence that is now twenty years old. The remainder of his offenses are for conversion, theft, receiving stolen property, possession and distribution of marijuana, disorderly conduct, and shoplifting. Under these circumstances, we find a 49-year combined sentence excessive. Accordingly, we revise Fields's sentences as follows: UPF/SVF – advisory sentence of 10 years, enhanced by habitual offender adjudication of 10 years; two counts of pointing a firearm – advisory sentence of 1 and 1/12 years respectively, with all running consecutively for a total of 23 years.

Affirmed in part. Reversed in part. Remanded with instructions.

SHARPNACK, J., and MATHIAS, J., concur.